IN THE HIGH COURT OF BOMBAY AT GOA
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FIRST APPEAL NO. 84 OF 1996

1. Smt. Dameana Rodrigues
   (since deceased represented
   by legal heirs):

2. Shri Sebastiao Miranda,
   aged 52 years, Agriculturist,
   r/o Dhumashem, deceased,
   represented by legal heirs:
   a) Jeronimo Miranda,
   b) Francisco Miranda, both
      r/o Dhumashem,

3. Smt. Conceicao Fernandes,
   housewife,

4. Shri Duarte Miranda,

5. Shri Maira Caetan Miranda,
   both r/o Dhumashem, Goa,

6. Shri Simao Miranda,
   major, Agriculturist,

7. Smt. Maria Apalana Dias,
   major, housewife,

8. Shri Pascoal Miranda,
   major, toddy tapper, all
   above r/o Dhumashem, and

9. Smt. Martha Miranda,
   major, r/o Dhumashem, Goa. ... Appellants.

Versus

1. Shri Pedro Domingos Miranda,
   (expired) no L.Rs., major,
   Agriculturist, r/o Sal, Kholpem,

2. Shri Joao Francisco Miranda
   Agriculturist, r/o Dhumashem,

3. Smt. Esmeralda Miranda, r/o
   Dhumashem,

4. Smt. Inacio Miranda,
   married, r/o Dhumashem, since
   deceased by his L.Rs.:

   i) Shri Sebastio Miranda,
      major, 28 years of age,

ii) Kum. Jakina Miranda, major, 25 years of age,

iii) Kum. Fula Miranda, major, 23 years of age,

iv) Kum. Rosa Miranda, major, 18 years of age,

v) Master Pedro Miranda, major, 21 years of age, all r/o Dhumacem, Bicholim, Goa.

5. Smt. Idalina Miranda,r/o Dhumashem,

6. Shri Diofo Miranda, major, r/o Dhumashem,

7. Shri Constancio J. Miranda, r/o Dhumashem,

8. Shri Caetano Miranda, major, r/o Dhumashem,

9. Smt. Cecilia Miranda, major, housewife, r/o Dhumashem,

10. Luciana M. e Lobo,

11. Jeronimo Lobo,

12. Eugene Lobo, respondent nos. 10,11,12, all r/o Cudassem Sawant-wadi,

13. Matha Dias,

14. Idalina Dias,

15. Domnic Dias,(expired), survived by widow, husband of Idalina Dias, defendants no.13, 14 nd 15 r/o House no.169, Wadi, Aforamento, Siolim, Goa,

16. Rosa Miranda, unmarried, (expired) no L.Rs.

17. Santana Miranda,

18. Clementina Miranda (Expired)

survived by respondent nos.17 and 19,

19. Piedade Miranda, r/o Dhumashem, Goa, respondent nos.16, 17, 18 & 19 all r/o Dhumashem, Goa,

20. Smt. Felecidade Miranda, Dhumashem, Goa,

21. Shri Duarto Miranda (Expired), survived by respondent no.20, major, toddy tapper, r/o Dhumashem, Bicholim, Goa, and

22. Smt. Maria Caetana Miranda, major, r/o Chumashem, Bicholim, Goa. ... Respondents.

Mrs. A. A. Agni, advocate for the appellants.

Mr. A. Kansar, advocate for respondent nos.2, 3, 4(1), to 4(5), 5, 6 & 19.

CORAM: B. H. MARLAPALLE, J.

DATE : 17th September, 2004.

ORAL JUDGMENT

This appeal arises from the dismissal of Special Civil Suit No.7 of 1979 by the leaned Civil Judge, Senior Division at Bicholim, vide Judgement and Order dated 31st October, 1995. The said suit was instituted by the present appellants for declaration and partition.

2. It was the case of the plaintiffs that they are descendants of one Jeronimo Miranda, whereas defendant nos.1 to 6 are the descendants of late Pedro Miranda and defendant nos. 7 to 9 are the descendants of late Constancio Miranda. These three persons, namely Constancio Miranda, Jeronimo Miranda and Pedro Miranda, had taken "aforamento" from the

Comunidade of Dhumashem jointly on "fora" in the year 1897 and the "fora" was paid every year in the name of these three individuals. The "aforamento" was known as "Aimpa Xetatil Mali" or "Aimp Mali" situated at Dhumashem of Bicholim Taluka. The property was given two survey nos.i.e. 43 and 46. The first property was sub-divided in 8 parts, whereas the second property was divided into 9 sub-divisions. They had claimed that they had 1/3rd share in the entire suit property and they were therefore entitled for partition to that extent, alongwith the fruit trees standing on the respective shares.

3. The defendants filed their written statement and opposed the suit. They contended that the suit property was not a joint ownership property and the plaintiffs had no right to claim 1/3rd share. According to them, Constancio Miranda and Pedro Miranda had obtained the "aforamento" of the Comunidade of Dhumashem in respect of the land in survey nos.43 and 46 and Jeronimo Miranda was neither having any share in the said "aforamento", nor was he a brother of Pedro and Constancio Miranda. In short, the defendants claimed that the plaintiffs were not from a branch of their family and they were aliens. On appreciation of the oral and documentary evidence placed on record by the respective parties, the trial court held that the plaintiffs had proved their status as joint owners alongwith the defendants and also joint possessors on part of the property, namely survey no.43/7, 43/9 and 43/11, as well as survey no.46/9. The evidence also

proved that the plaintiffs had a residential dwelling on survey no.43/10. However, the plaintiffs' claim that they had 1/3rd share in the suit property was rejected and, therefore, the prayer for partition was also turned down. The trial Court also held that the defendants were not exclusive owners and possessors in enjoyment of the suit property and that there were no common ancestors between the plaintiffs and the defendants. The defendants failed to prove that their ancestors had allowed the ancestors of the plaintiffs to construct a house in the property bearing survey no.43/10. It was further held that the earlier suit no.50/78 did not touch upon the relief sought in Special Civil Suit No.7/79.

4. On behalf of the plaintiffs, P.W.1, Simao Miranda, P.W.2, Laxman Sawant, P.W.3, Sitaram Naik and P.W.4, Nakul Porob, were examined, whereas the defendants had examined D.W.1, Inacio Miranda, D.W.2, Mahadev Parab, and D.W.3, Angela Lobo. The case of the plaintiffs was based on the documentary evidence at Exh.P.W.1/A, Exh. P.W.1/B colly. and P.W.1/C colly. At Exh.P.W.1/E, a copy of the plan was placed on record in addition to the order dated 6th June, 1972, passed by the Awal Karkun, Bardez, and marked as Exh. P.W.1/F. The death certificate of Jeronimo Miranda, birth certificate Simao Miranda (2) and death certificate of Simao Miranda (1) as well as the birth certificate of Jose Luis de Miranda, were placed on record. The defendants on the other hand, had placed on record Form I and Form XIV as well as the certificate at Exh.

D.W.1/A. The document in Form I and Form XIV are part of the revenue record and the plaintiffs have duly proved that the property in Survey nos.43/7, 43/9, 43/11 and 46/9 were jointly held by them with some of the defendants, though not all of them. On the other hand, the defendants' case that the plaintiffs did not have any share in the other sub-divisions of survey nos.43 and 46 has been accepted by the trial Court. This is more so because of the order at Exh.P.W.1/F. This was an application made by some of the defendants to the Talathi of Dumashem for a declaration that they had 2/3rd ownership right in the entire property by inheritance and that the plaintiffs had only 1/3rd right in the said property and on this basis, request was made to delete the names of the plaintiffs from survey nos.43/7, 43/11 and 46/9, alleging that they were wrongly entered as co-occupants. This application came to be rejected by Order dated 6th June, 1972 and it received finality.

5. The certificates of births/deaths were relied upon by the plaintiffs to establish their lineage with the defendants. During the course of the trial of the suit, the plaintiffs attempted to plead their case to the effect that their ancestor Jeronimo was the real brother of Constancio and Pedro and all these three brothers had obtained "aforamento" in 1897, in respect of the suit property. The defendants had denied such a relationship though they had accepted that the "aforamento" was granted jointly in the name

of Constancio and Pedro. Documentary evidence brought on record by both the parties by way of payment of revenue again showed the claim of joint ownership on part of the property though not on the entire property, but sofar as lineage is concerned, even the plaintiffs in their plaint had never claimed that the late Constancio, Pedro and Jeronimo were three real brothers, though they were emphatic continuously to say that the grant was made in favour of all the three persons, and, therefore, Jeronimo had 1/3rd share in the suit property. In the Code of Comunidades, there is no specific provision that the joint grant is made only in respect of the persons belonging to the same family. Form XI is regarding the "tombo 1" book no.1 under Article 548 and Form XII is the "tombo 2" book under Article 551 of the Code. Article 548 clearly provides for the record being maintained of the property which was not leased, but Article 551 speaks about the property leased out for which quit rents ("foros") and remaining taxes are expected to be paid to the Comunidade. Article 153 of the Code deals with the powers of the Governor General and Art.5 states that the Comunidades are under the administrative tutelage of the State according to the Rules contained in the Code and their lands may be given on long lease or transfer in the form established in the Code. The scheme of the Code shows that a joint lease can be granted in favour of person or persons, irrespective of whether they are members of the same family or different families in the village. As noted a little while ago, it was not the case of

the plaintiffs that all the three original grantees, i.e. late Constancio, Pedro and Jeronimo were real brothers, and, therefore, the failure of the plaintiffs to prove lineage between them and the defendants need not be fatal to their prayer for declaration and partition.

6. It was sought to be submitted before me by the learned counsel for the defendants that a suit for partition or, for that matter declaration, could not have been entertained by the trial court unless the inventory proceedings were initiated and resulted in a final order of inventory. This issue will also be applicable only if the partition is sought by the family members.

7. The plaintiffs' case of joint ownership on the entire suit property was mainly based on the document at Exh.P.W.1/A, which is purportedly a certificate issued by one Mr. Aziz Khan, clerk in charge of the Comunidades of Adwolpale on or about 21st August, 1977. This document has not been considered by the trial Court for the reasons that the contents herein were not proved either on the basis of the record maintained by the concerned Comunidade or by examining the person who issued the said certificate, i.e. Mr. Aziz Khan. It was contended by Mrs. Agni, learned counsel for the plaintiffs that so long as the certificate carried the seal of the Comunidade, there was no necessity to examine any further witness.

8. The learned counsel for the defendants has provided the English translation of the said certificate and the translation has not been disputed by the other side and, therefore, it could be safely accepted to be the correct translation, as reproduced herebelow:-

Certificate

" A. Aziz Khan, Clerk-in-charge of Comunidades of Adwolpale - Latambarcem - Mercurem - Dumacem (group) of Taluka of Bicholim - Certify having seen the book Tombo B-2 of Comunidade of Dumacem, initialled on twenty-seventh of April, Eighteen Ninety Seven, existing in the record, in my charge and there at pages three reverse and four at number seventeen the land called Aimpaxetatil-Moli, is listed in the names of Pedro Miranda, Constancio Miranda, Jeronimo Miranda Parikkars residents in Parra - Issued this at the oral request of Pascoal Miranda resident in Dumacem -

That is of Fifty Paise common emoluments which are shown at Serial No.1 at page Forty of the respective book.

Adwolpale on 21 of August, of 1977.

Sd/- Clerk-in-charge."

9. This certificate indicated that Mr. Aziz Khan certified certain information being available on the record of the Comunidade concerned and it was his personal knowledge. It was necessary for the plaintiff to examine him and obviously the contents in these documents were required to be proved by placing before the trial Court the concerned registers maintained by the Comunidade. This exercise was not impossible and by their own choice the plaintiffs failed to so

so. No fault could be found with the view taken by the trial Court in that regard. At the same time, this document shows a prima facie evidence regarding the grant made by the Comunidade jointly in favour of the plaintiffs and the defendants' ancestors. Even the trial Court has recorded a finding regarding joint ownership of four properties as stated hereinabove between the plaintiffs and some of the defendants. It is necessary that the disputes between the parties are set at rest once and for all by undertaking the exercise of examining the record of the Comunidade.

10. When any claim for joint ownership in respect of immovable property is placed before the Court and if some prima facie evidence in support of that is brought on record, it was necessary for the plaintiffs to prove such documents so as to bring on record the evidence in support of their case. Even if the plaintiffs failed to do so in the instant case, dismissing the appeal would not be in the interests of either of the parties. Once the record of the Comunidade comes before the trial Court all the issues regarding the joint grant between two or three persons or the type of grant and all other related issued could be gone into. There is no dispute that on some portion of the suit property both the plaintiffs as well as the defendants have their residential dwellings as well as cultivation which appears to have been of not recent origin. The prayer of the defendants to remove the names of the plaintiffs from some portion of the property has

been adjudicated by the Awal Karkun from the Mamlatdar's office and that order has received finality. The cumulative effect of these attendant circumstances leads to an inference of a long-standing joint possession on part of the property between the two sides and the claim of the respective parties, namely the defendants' claim of 1/3rd share on the entire property and the defendants' claim of exclusive possession and rights in respect of the property claimed by them before the Mamlatdar require to be adjudicated afresh. The written arguments filed by both the parties though have been duly considered by the trial Court, it would not be in the interests of the respective parties to keep the inter se disputes lingering with uncertainties and for indefinite period. The evidence by way of record maintained by the concerned Comunidade would go to the root of the claims and counter-claims and such records are said to be available with the said Comunidade. The Comunidade has employees who could be examined and the administrator concerned would ensure that the the record of the above is placed before the trial court alongwith an employee of the said body, i.e. the Comunidade, who could be examined as an independent witness.

11. In the result, this appeal is partly allowed. The impugned Order is quashed and set aside and the Special Civil Suit No.7/79 is hereby remanded for fresh trial. The plaintiffs shall apply to the trial Court to summon the witnesses from the concerned Comunidade and also to call for

the concerned record maintained by it. Such an application shall be made within 15 days after the court below receives the Record and Proceedings from the Registry of this Court. The parties may be at liberty to bring such other evidence that may be available with them but was not brought on record earlier for whatsoever reasons. The adjudication on remand shall be completed as expeditiously as possible and preferably within a period of six months from the date the plaintiffs make an application for summoning the officer of the Comunidade. Costs in cause.

B. H. MARLAPALLE, J.

mc.